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Consumer rights and comparison websites: Need for action

Series of Bundeskartellamt papers on
"Competition and Consumer Protection in the Digital Economy"

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Table of contents

A.	Introduction	1
B.	Investigations	1
C.	Comparison websites: market overview	2
D.	Consumer rights issues.....	3
I.	Cooperations.....	3
II.	Market coverage.....	3
III.	Rankings.....	4
IV.	Other influencing factors.....	5
V.	User ratings.....	6
E.	Conclusion	6

Consumer rights and comparison websites: Need for action

A. Introduction

By facilitating the comparison of a large number of offers for the same product or service, online comparison websites can clearly contribute to reduced search costs for consumers and help them make better buying decisions. However, comparison websites have often been criticised for not being sufficiently neutral or transparent when it comes to key elements like an independent comparison, wide market coverage, ranking, information on availability or handling of user ratings. Problematic conduct of comparison websites in this context can push customers to make buying decisions they would not have made if they had been aware of all the relevant facts in the market. In individual cases, such conduct may constitute a violation of the German consumer rights provisions, particularly the Act Against Unfair Competition (UWG). The stipulations of the UWG have been harmonised with the corresponding provisions of the European Member States by the Unfair Commercial Practices Directive, which includes unfair advertising¹.

Against this background the Bundeskartellamt initiated a sector inquiry on comparison websites in October 2017 applying its new competencies in the area of consumer protection². The aim of this sector inquiry is to analyse the problem areas which keep coming up in the context of comparison websites by investigating the companies concerned and to perform a legal assessment of the inquiry results. The sector inquiry targets the economic sector of comparison websites as a whole rather than individual companies. Starting a public consultation on 12 December 2018 the Bundeskartellamt presented the results of its investigation and a preliminary legal assessment. The market players concerned and other interested parties can approach the Bundeskartellamt with their comments on the paper until 4 February 2019.

B. Investigations

The sector inquiry was carried out among comparison websites operating in Germany and offering

¹ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council - Unfair Commercial Practices Directive.

² Since June 2017 the Bundeskartellamt has held the power to initiate sector inquiries in connection with violations of consumer rights or make statements as *amicus curiae* in court. However, the Bundeskartellamt does not hold powers of intervention. Cf. Sections 32e(5) and 90(6) of the German Competition Act (GWB).

consumers, as their main function, to compare and order standardised services offered by various companies. The Bundeskartellamt focused on service areas that are particularly relevant for consumers, i.e. energy, telecommunications, insurances, financial services and travel. The inquiry did not include websites that focus on one-off goods deliveries (e.g. Amazon Marketplace), product testing reviews (e.g. Stiftung Warentest) or individualised services (e.g. MyHammer) because of their distinctive underlying business models.

The sector inquiry was carried out in two stages. Firstly, the Bundeskartellamt asked approx. 150 German comparison websites about their size, structure and cooperations in its “structure questionnaire”. On this basis, the Bundeskartellamt conducted a comprehensive and detailed enquiry about individual topics addressing the most relevant websites in their respective sectors. For this purpose eight specific “sector questionnaires” were developed. 36 comparison websites were obliged to respond by a formal request for information.

C. Comparison websites: market overview

The first comparison websites were started about twenty years ago, and have been continuously gaining in importance since. Around 90% of the surveyed companies’ revenue is generated by commissions paid for their agency services, with flight comparison websites being an exception. Typically, meta search engines are paid by cost-per-click (CPC) arrangements rather than by commissions.

Although there is a large number of websites in all sectors, the market is highly concentrated in most sectors, in particular where comparison websites have been existing for a long time. Check24 and Verivox are the dominating comparison websites in the areas of energy and telecommunications. When it comes to insurances, Check24 is the leading website. Besides Check24, Finanzcheck, Smava and Verivox are relevant websites for loan comparisons. Comparison websites are particularly popular in the travel business. In this sector, concentration tends to be lower than in others sectors despite the fact that there are close corporate links between individual sites. Relevant online travel agencies (OTA) include the Booking, Expedia and HRS groups for hotels, while Fluege.de, Last-minute.de and Opodo are particularly relevant OTAs for flight search. Additionally, meta search engines comparing the offers of different travel websites have become a new business model in the travel sector in recent years. Important providers in this sector include the Booking group with Kayak, Swodoo and Momondo and Google, Skyscanner, Tripadvisor and Trivago. Across sectors comparison websites have similar features and business models; however, each sector has its own specific features. It is helpful for consumers to know these specific features so they can use the websites effectively.

D. Consumer rights issues

The outcome of the investigations into the individual topics is summarised below. The legal assessment of the results, which is still conditional upon the upcoming consultation, has shown that the described conduct of the comparison websites under review is in parts prone to consumer rights violations. Mostly, these are violations of the transparency obligation, or misleading practices or hidden advertising activities within the meaning of the UWG. However, a sector inquiry is not the suitable legal instrument to examine individual websites for specific kinds of misconduct. Should the authority be granted enforcement rights in future, the Bundeskartellamt can prosecute infringements in the course of individual administrative proceedings. In some proceedings it might be reasonable and appropriate to also conduct investigations to assess consumer expectations.

I. Cooperations

The investigations into the first problem area, cooperations, have shown that a large number of horizontal cooperations exist between websites in all sectors. In some cases, allegedly independent websites merely use another website's data basis and/or calculator tools without informing the consumer accordingly. However, in most sectors the importance of non-independent websites is relatively low. Most cooperations involving a shared calculator tool exist among travel websites. If the website using its partner's calculator tool creates the impression of providing independent analyses, this website is unlawfully misleading its customers, according to the authority's preliminary assessment. Price-sensitive consumers are particularly likely to check several websites before making their buying decision. They might get the false impression that an offer is equally well rated by various independent websites as the search results from several cooperating websites are identical, which could prevent them from making further enquiries with truly independent websites (Section 5(1) UWG).

II. Market coverage

The investigations conducted on the second problem area, market coverage, have shown that the degree of market coverage heavily depends on the sector and the websites. Due to fact that some suppliers generally refrain from selling via comparison websites and that some websites exclusively show offers from suppliers paying a commission, websites from the insurance, hotel and loan sectors exhibit a comparatively low market coverage. As consumers are often not informed about which suppliers are not shown on a comparison website, they run the risk of making a premature and hence less than ideal buying decision. If consumers are left in the dark about the level of market coverage for lack of or insufficient information by the websites, this may constitute a violation of the transpar-

ency obligations pursuant to Section 5a(2) UWG. Comparison websites might, for example, not inform about the insurance companies or groups of tariffs listed, or hotel comparison websites might restrict their offers to hotels that pay commissions. This information is essential for consumers as they might choose to look for price information elsewhere if they knew about these shortcomings. The Federal Court of Justice has already confirmed this claim with regard to commission-paying suppliers, albeit in a service area that was not included in this inquiry.³ Section 60(2) of the German Insurance Contract Act (VVG) is a corresponding provision which applies specifically to insurances.

III. Rankings

The ranking settings for the initial ranking and the relevance of commissions paid by suppliers for favourable positions are the third problem area. This area is both significant and complex, which is why this topic has been dealt with under three different aspects in the sector inquiry:

A website may have various reasons for excluding certain offers from its initial ranking. Offers containing pitfalls in the contractual arrangements difficult to detect for consumers may, for example, be excluded from the comparison to the benefit of consumers. However, the inquiry has also shown that some initial rankings in the energy sector only contained offers from providers that pay commissions to the website. If the consumer is not or not sufficiently informed about the fact that the recommendations are commission-based only even though data on further providers would be available, the Bundeskartellamt's preliminary assessment is that this may constitute a violation of the transparency obligation pursuant to Section 5a(2) UWG.

Additionally, some websites show a "position 0" above the initial ranking, which is highlighted. As much as around 25% of consumers concluding a contract via such websites decide to buy one of these offers. While flight offers and insurance tariffs, for instance, are mostly highlighted based on a qualitative assessment by the website, websites covering other sectors like energy and telecommunications mostly offer this prominent position above the ranking to whichever supplier pays the highest commission. The Bundeskartellamt preliminarily assesses this as hidden advertising in cases where consumers are led to believe that the offer has been highlighted because of its particularly high quality (Section 5a(6) UWG). This assessment has been supported by initial court decisions.⁴ If position 0 is not exclusively commission-based, but also based on quality criteria, it may still be considered as hidden advertising because of the payment required to put the offer above the actual

⁴ Cf. Munich I District Court, judgment of 18 March 2015, file 37 O 19570/14 = wrp 2015, 781, 784/785 – *Premium Partner*; Federal Court of Justice, judgment of 31 October 2012, file I ZR 2015/11, judgment para. 17 – "*Preisrätselgewinnauslobung V.*"

ranking in the first place.

As far as the hotel sector is concerned, the amount of commissions paid to OTAs affects the positions of the offers on the initial ranking. The commission rate paid by a hotel is either considered directly, indirectly in partner programmes subject to fees or in ranking boosters. Some meta search engines also take the amount of payments amount into account, both in the (vertical) display of various hotels and in the (horizontal) comparison of several offers for the same hotel. The consumer is typically not informed about the exact influence of the paid amounts on the ranking and has no option to explicitly exclude this influencing factor from the ranking. If this practice involves that the website presents its initial ranking in such a way that consumers are led to believe that it is based on actual recommendations, there is reason to assume that customers are unlawfully misled (Section 5(1) UWG). Consumers probably do not expect an initial ranking defined as a recommendation to be based on providers' commission rates. Both national case-law and the European Commission's position support this view.⁵ The frequently encountered general notes on the comparison tool's websites indicating that commission rates are being considered in the ranking are not a sufficient remedy, as they have been shown to lack clarity and precision.

In other sectors where the order of the initial ranking depends on the calculated effective price (especially in the energy and telecommunications sectors), it would be easier to detect an impact of commission rates on ranking positions; however, in fact, there is no such impact. Nevertheless, by offering lump-sum payments for specific offers and including them in the calculation of the effective price, comparison websites can still influence the ranking in a way that reflects their interests.

IV. Other influencing factors

The investigations into the fourth problem area under review, other influencing factors, have shown that the comparison websites examined use various approaches to lure consumers into (prematurely) booking via their website. Especially in the travel sector websites highlight limited availabilities of individual offers, exceptionally high demand or rising prices. Consumers often cannot assess whether the information actually refers to their concrete inquiry and how significant it is to them. Further influencing factors used by comparison websites in many sectors are the assurance of benefits like cashback rewards and best price guarantees. Consumers often do not claim these benefits as they either cannot or do not want to comply with the extensive criteria they are conditional on. And finally, many comparison websites label offers as exclusive even though they are available on other websites for the same conditions, too. Particularly relevant criteria for a violation pursuant to Section

⁵ Cf. Berlin District Court, decision of 25 August 2011, file. 16 O 418/11; *European Commission*, Guidance on Unfair Commercial Practices Directive of 25 May 2017, p. 155f.

5(1) UWG are untrue or misleading indications of a limited availability of hotel offers and a non-existent exclusivity of offers in the areas of energy, telecommunications, insurances and loans. Cashback rewards in the telecommunications sector which are hardly ever claimed in practice due to excessive conditions harm consumers. However, it seems that it would require extensive investigations to substantiate that they qualify as unlawful under the existing unfair competition legislation, as they result from an error of judgement committed by the consumers themselves.

V. User ratings

When it comes to the fifth problem area, user ratings, the Bundeskartellamt has determined that the websites examined almost exclusively use closed rating systems. In closed rating systems, only consumers who are given access to the rating system by the website owner may rate a product or service. The rating system is not available to other users. The risk of fake ratings is relatively low in such a system. However, as ratings in a closed rating system are limited to a specific user group or a particular point in time, they might be biased in a different way that is difficult for consumers to identify straightaway. Examples of this include users of loan comparison websites who were ultimately not granted a loan. Even though their experiences might be interesting for other users, they are not allowed to give their rating. Courts have already confirmed that certain set-ups of ranking systems can constitute a violation of the unfair competition legislation just like fake or manipulated information.⁶ Nevertheless, there is no reason to assume that these systems have been set up to mislead consumers, particularly if the shortcomings result from a closed rating system that was selected in order to prevent other kinds of misleading ratings.

E. Conclusion

Comparison websites offer many benefits to consumers. However, the sector inquiry has shown that comparison websites often do not correspond to the ideal of a neutral platform and that there is a need for action in some aspects. The Bundeskartellamt has so far not held the power to pursue and sanction companies for the violations it has determined in the course of its sector inquiry. Consumer rights violations outside the areas of technology and health are mainly prosecuted under civil law. The need for an authority to complement this consumer rights enforcement practice has been discussed for a while. This discussion also needs to be considered in the light of the CPC Regulation⁷

⁶ Cf. Düsseldorf Higher Regional Court, judgment of 19 February 2013, ref. I-20 U 55/12 = wrp 2013, 818, 820 – “Kundenbewertungen”.

⁷ Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No. 2006/2004 – CPC Regulation.

which was amended recently and now strengthens the powers of the competent authorities in the Member States and facilitates joint action by the Member States' authorities.

Private actors and new transparency requirements as conceived to be applicable to platforms in the context of the New Deal for Consumers⁸ and the proposed P2B Directive⁹ will not suffice to solve the consumer rights issues identified in the course of the sector inquiry on comparison websites. The relevant conduct is often complex, sector-specific and subject to constant change. Proceedings in this area can be very complex, as they may, for example, include the necessity to look into the comparison websites' algorithm-based conduct. It is also often necessary to inspect documents containing business secrets in order to prove that a violation was committed. Granting an authority enforcement rights based on existing UWG provisions could thus be an effective solution complementing the existing enforcement mechanisms.

⁸ *European Commission*, Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules of 11 April 2018 – Omnibus Directive.

⁹ *European Commission*, Proposal for a Directive of the European Parliament and of the Council to promote fairness and transparency for business users of online services of 26 April 2018 – P2B Directive.